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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Carrie Ferrara Clark,
10 Plaintiff,

11 v.
12 City of Tucson,

13 Defendant.
14

No. CV-14-02543-TUC-CKJ

ORDER

15 Pending before the Court is Defendant's Alternative Motion for: (1) Judgment as a
16 Matter of Law (renewed); (2) New Trial; or (3) Remittitur. (Doc. 281). Plaintiff filed a
17 Response (Doc. 304) and Defendant a Reply (Doc. 313). Oral argument was held on
18 October 30, 2019. (Doc. 322).

19 After due consideration and for the reasons outlined below, the Court finds that
20 Defendant is entitled to judgment as a matter of law for Plaintiff's claims relating to Title
21 VII. The Court finds that Defendant is also entitled to judgment as a matter of law, in part,
22 for Plaintiff's claims relating to the Fair Labor Standards Act ("FLSA"). Further, the Court
23 finds that a new trial is warranted as to damages connected to Plaintiff's FLSA claims if
24 Plaintiff declines to accept the Court's proposed remittitur.

25 ***1. Factual and Procedural Background***

26 Plaintiff has been an employee of the City of Tucson Fire Department ("TFD") since
27 2007. In July 2012, Plaintiff gave birth to her first son, Austin Clark, and decided to breast
28 feed while on maternity leave and to pump breast milk when she returned to work. Plaintiff

1 breast fed Austin while on maternity leave and contacted her superiors at TFD to ensure
2 she would have a proper place to pump and express breastmilk when she returned to work.
3 Upon her return to work, Plaintiff believed that the lactation spaces she was being provided
4 were not legally compliant and initiated the underlying lawsuit in 2014.

5 A ten-day jury trial was held in April 2019. (Docs. 255, 261, 282, 284, 293, 294,
6 and 296). The jury found in favor of Plaintiff and awarded Plaintiff \$50,000.00 in
7 compensatory damages for her Title VII Disparate Treatment claim, \$1,850,000.00 in
8 compensatory damages for her Title VII Retaliation claim, \$50,000.00 in compensatory
9 damages for her Fair Labor Standards Act claim, and \$1,850,000.00 in compensatory
10 damages for her Fair Labor Standards Act Retaliation claim. (Doc. 234). Although the jury
11 awarded Plaintiff \$50,000.00 in compensatory damages for her Title VII Disparate
12 Treatment claim and \$1,850,000.00 in compensatory damages for her Title VII Retaliation
13 claim, 42 U.S.C. § 1981a(b)(3) includes a statutory cap on damages in the amount of
14 \$300,000.00, which Plaintiff has acknowledged. *See* (Doc. 304, pg. 32) (“Plaintiff
15 concedes that the jury’s verdict on her Title VII claims should be reduced to the statutory
16 cap of \$300,000”).

17 **2. Judgment as a Matter of Law**

18 Defendant argues that it is entitled to judgment as a matter of law (“JMOL”) on five
19 issues and raises these issues as a renewed judgment as a matter of law (“RJMOL”).
20 Plaintiff disputes this and argues that Defendant failed to raise any of these issues,
21 excluding one, at trial and is now prohibited from raising these issues after trial. Ordinarily,
22 “to preserve a challenge to the sufficiency of the evidence to support the verdict in a civil
23 case, a party must make two motions. First, a party must file a pre-verdict motion pursuant
24 to Fed.R.Civ.P. 50(a). Second, a party must file a post-verdict motion for judgment as a
25 matter of law or, alternatively, a motion for a new trial, under Rule 50(b).” *Nitco Holding*
26 *Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007) (internal citations omitted). The
27 requirement that a Rule 50 motion be made pre-verdict in order to raise a motion post-
28 verdict “is to be strictly observed . . . failure to comply with it precludes a later challenge

1 to the sufficiency of the evidence on appeal.” *Saman v. Robbins*, 173 F.3d 1150, 1154 (9th
2 Cir. 1999).

3 At trial, Defendant orally moved for judgment as a matter of law and raised a myriad
4 of issues, among them the following: (1) whether the FLSA requires a lock on doors for
5 compliance; (2) whether there was testimony that supported a retaliation claim; (3) whether
6 Plaintiff was subjected to any adverse employment actions; (4) whether comparator
7 testimony offered by Plaintiff was proper; and (5) whether there was any evidence
8 presented that Plaintiff was treated less favorably because of her sex. (Doc. 255, pg. 2-3).

9 In contrast, Defendant’s RJMOL raises five specific issues: (1) whether 29 U.S.C.
10 § 207(r) provides a private cause of action; (2) whether there was sufficient evidence to
11 support a finding that Defendant met its FLSA requirements; (3) whether Plaintiff suffered
12 any adverse employment actions; (4) whether there was any evidence of retaliatory intent;
13 and (5) whether Defendant discriminated against Plaintiff on the basis of sex. (Doc. 281,
14 pg. 4-16).

15 As is evident, the issues raised by Defendant in its oral JMOL do not perfectly mirror
16 the issues raised by Defendant in its RJMOL. The threshold question, then, is whether
17 Defendant should be permitted to raise issues in its RJMOL that weren’t originally raised
18 in its JMOL. To make such a determination, the purpose of the requirement must be
19 examined. A JMOL exists as a precursor to an RJMOL for two reasons:

20 The first is to preserve the sufficiency of the evidence as a question of law.
21 A subsequent motion for a [RJMOL] will then allow the district court to
22 reexamine its decision not to direct a verdict as a matter of law rather than to
23 engage in an impermissible reexamination of facts found by the jury. The
24 second purpose of a motion for a directed verdict is to call the claimed
25 deficiency in the evidence to the attention of the court and to opposing
26 counsel at a time when the opposing party is still in a position to correct the
27 deficit. These purposes are served when a party, after the close of evidence
28 and before the commencement of jury deliberations, clearly points out a
claimed evidentiary deficiency to court and counsel and makes a request,
however denominated, that the court determine the evidence to be
insufficient as a matter of law.

Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426, 1428-29 (9th Cir. 1986) (internal

1 citations omitted). *See also Howard v. Walgreen Co.*, 605 F.3d 1239, 1243 (11th Cir. 2010)
2 (quoting *Nat'l Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir. 1986))
3 (“[T]he purpose of requiring the grounds asserted in a Rule 50(b) motion to align with
4 those asserted in a Rule 50(a) motion ‘is to avoid making a trap of the motion for judgment
5 notwithstanding the verdict, either at the trial stage or on appeal. When a claimed
6 deficiency in the evidence is called to the attention of the trial judge and of counsel before
7 the jury has commenced deliberations, counsel still may do whatever can be done to mend
8 the case. But if the court and counsel learn of such a claim for the first time after verdict,
9 both are ambushed and nothing can be done except by way of a complete new trial. It is
10 contrary to the spirit of our procedures to permit counsel to be sandbagged by such tactics
11 or the trial court to be so put in error.’”).

12 Although the requirement that a party move for JMOL after the presentation of its
13 evidence is strictly enforced, courts “are generally more liberal about what suffices as a
14 motion for a directed verdict after the close of all the evidence. Fed.R.Civ.P. 50(b) may be
15 satisfied by an ambiguous or inartfully made motion for a directed verdict or by an
16 objection to an instruction for insufficient evidence to submit an issue to the jury.” *Reeves*
17 *v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989) (internal citations omitted). “Absent such
18 a liberal interpretation, ‘the rule is a harsh one.’” *E.E.O.C. v. Go Daddy Software, Inc.*, 581
19 F.3d 951, 961 (9th Cir. 2009) (citing *Nat'l Indus., Inc.*, 781 F.2d at 1549).

20 At trial, Defendant orally moved for JMOL and stated the following:

21 We’ll make our Rule 50 motion. Just that the evidence has been that all of
22 the stations had a compliant room that was free from intrusion and free from
23 the public’s view. The only issue was whether or not a lock was required.
24 The law doesn’t require a lock, not by the letter of the law. Not in any case
25 law interpretation of the law has there been a requirement for the lock. And
26 the testimony has been that there was a space at every station perhaps except
for Station 9 where there was a study room that the window could have easily
been covered and that would have also met requirements.

27 As far as the retaliation, there’s been -- for both retaliation counts, there’s
28 been a lot of testimony about specific actions that have occurred over the
four-year period -- four-year period of time, many of which is not disputed

1 that those things occurred. There's been no causal connection, no evidence
2 of the causal connection presented. There hasn't been any testimony to
3 connect that any of the these actions occurred because of these complaints
4 that were filed. The time line itself is not enough to establish that causal
5 connection, so we don't think that the jury actually has any evidence to
6 connect those other than the time line that has been presented to them over
7 and over again. Nor has there been evidence that any of these actions were
8 actually [adverse] under the letter of the law. None of the actions affected her
9 pay or benefits other – you know, so I don't think that all of the actions have
10 been determined or have been presented as being actually adverse.

11 As far as the Title 7 discrimination claim, we heard from the alleged three
12 comparators who we still, your Honor, move they were not actually
13 comparators. Their circumstances were very factually different. Their
14 changes in assignments were due to disciplinary action. It's not something
15 that they requested. They weren't assigned to a station that they requested or
16 wanted. In addition to being moved, they were subjected to pay reduction
17 and a couple of them testified they also had conditions of employment. I think
18 it's evident that they didn't want their assignments that they were moved to
19 just by the fact that as soon as they were able to get out of that assignment
20 they did. So we don't think that there's actually been any evidence that they
21 were actually similarly situated, so I don't think there has been any evidence
22 presented that she was treated less favorably or they were treated more
23 favorably than her because of her sex. I think the other Title 7 allegation --
24 actually, I think that's all I heard about the Title 7 discrimination. I don't
25 know if there's another one. I can address if Mr. Jacobson can point out what
26 the other discrimination claim is. That's what I think the only one that's been
27 somewhat presented, but I can address that if he brings something else up.

28 So basically our motion is that we don't think that there's been sufficient
evidence presented for which the jury can go back and deliberate on.

(Doc. 255, pg. 2-4).

While Defendant's oral JMOL raises a multitude of issues, "[s]trict identity of issues
. . . is not required. So long as they are 'closely related,' such that opposing counsel and
the trial court may be deemed to have notice of the deficiencies asserted by the moving
party, the purposes of the rule will be satisfied." *Howard*, 605 F.3d at 1243(quoting *Nat'l
Indus., Inc.*, 781 F.2d at 1549).

Given the rationale behind the requirement and the relatively liberal application, the

1 Court will address whether Defendant properly raised each issue in its RJMOL in its JMOL
2 separately.

3 *A. Fair Labor Standards Act*

4 Plaintiff concedes that Defendant raised this issue during its oral JMOL at trial and,
5 therefore, the Court will not address whether Defendant has now properly raised this issue
6 in its RJMOL. *See* (Doc. 304, pg. 3) (“The sole issue that Defendant raised in both its
7 motion for JMOL during trial and its post-trial renewed JMOL, whether the evidence
8 supports a finding that Defendant failed to satisfy FLSA requirements, fails as a matter of
9 law.”).

10 *B. Adverse Actions*

11 In Defendant’s JMOL, Defendant, while discussing Plaintiff’s retaliation claims,
12 states:

13 The time line itself is not enough to establish that causal connection, so we
14 don’t think that the jury actually has any evidence to connect those other than
15 the time line that has been presented to them over and over again. **Nor has**
16 **there been evidence that any of these actions were actually [adverse]**
under the letter of the law.

17 (Doc. 255, pg. 3) (emphasis added).

18 It is apparent that Defendant raised the issue, at trial, of whether there had been any
19 evidence advanced that the actions taken against Plaintiff were “adverse.” Plaintiff
20 contends that Defendant only raised three arguments in its JMOL whereas it raised five in
21 its RJMOL. *See* (Doc. 304, pg. 2-3) (“At trial, in its brief oral Motion for Judgment as a
22 Matter of Law (JMOL), Defendant raised three arguments . . . Defendant’s renewed JMOL
23 raises five arguments . . .”). Plaintiff’s interpretation of Defendant’s oral JMOL is rather
24 restricted. Although the law is clear that any issues raised in a post-trial RJMOL must have
25 been raised previously in a JMOL, there is no requirement that the issues must identically
26 mirror each other. Defendant unambiguously argued that Plaintiff advanced no evidence
27 that any actions taken against Plaintiff “were actually adverse under the letter of the law.”

28

1 (Doc. 255, pg. 3). This is sufficient to place Plaintiff on notice of the alleged deficiency
2 asserted by Defendant and, therefore, meets the requirements of Rule 50.

3 *C. Retaliatory Intent*

4 When discussing Defendant's alleged retaliatory intent, Defendant, in its JMOL,
5 stated:

6 There's been no causal connection, no evidence of the causal connection
7 presented. There hasn't been any testimony to connect that any of the [sic]
8 these actions occurred because of these complaints that were filed.

8 (Doc. 255, pg. 3).

9 This argument unambiguously states Defendant's argument and position that
10 Plaintiff failed to meet her burden with respect to Defendant's alleged retaliatory intent and
11 Defendant meets the requirements of Rule 50 for this issue.

12 *D. Sex Discrimination*

13 With respect to Defendant's argument that Plaintiff failed to provide sufficient
14 evidence that Plaintiff was discriminated against based upon her gender, Defendant, in its
15 JMOL, stated:

16 So we don't think that there's actually been any evidence that they were
17 actually similarly situated, so I don't think there has been any evidence
18 presented that she was treated less favorably or they were treated more
19 favorably than her because of her sex.

19 (Doc. 255, pg. 4).

20 It is also evident that Defendant raised the issue that Plaintiff failed to meet its
21 evidentiary burden regarding alleged gender discrimination. Admittedly, the issue was
22 raised almost tangentially within a separate argument relating to comparator employees,
23 but "[t]echnical precision is unnecessary. A rigid application of the rule is in order only if
24 such application serves either of the rule's rationales—protecting the right to trial by jury
25 or ensuring an opposing party has sufficient notice of an alleged error so that it may be
26 cured before the party rests its case. *Id.* We consider whether the grounds stated in the
27 motion are sufficiently specific on a case-by-case basis. See *id.* at 1504." *United Int'l*
28 *Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228-29 (10th Cir. 2000), *aff'd*,

1 532 U.S. 588 (2001). Defendant meets the requirements of Rule 50 for this issue.

2 *E. Private Right of Action*

3 The last issue is whether Defendant adequately preserved its argument relating to
4 29 U.S.C. § 207(r) and whether it provides for a private right of action. Defendant concedes
5 that it failed to raise this issue in its oral JMOL at trial. *See* (Doc. 313, pg. 4) (“[T]he only
6 issue raised in the Rule 50(b) renewed motion for judgment as a matter of law that was not
7 raised as part of the Rule 50(a) motion during trial is whether there is a private cause of
8 action under 29 U.S.C. § 207(r).”).

9 Despite this, Defendant contends that since this is a legal question that does not
10 depend on the sufficiency of the evidence, it was not required to assert it during its JMOL.
11 In support, Defendant cites *Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1361 (Fed. Cir. 2001).
12 *Shockley* is distinguishable. There, the Federal Circuit discusses the Fourth Circuit’s policy
13 of applying “a rarely utilized exception, allow[ing] a party to make a Rule 50(b) motion
14 despite failure to file a Rule 50(a) motion where: (1) the basis for the Rule 50(b) motion is
15 a purely legal issue; and (2) the opposing party had notice of the defect and an opportunity
16 to correct the error.” *Shockley*, 248 F.3d at 1361.

17 No such corollary exception is recognized in this Circuit. In *Helionetics, Inc. v.*
18 *Paige & Assocs., Corp.*, plaintiff Helionetics failed to raise an issue during its JMOL and
19 subsequently raised that issue in its RJMOL. The district court prohibited that issue from
20 being raised in its RJMOL because it failed to raise it in its JMOL. Like Defendant,
21 Helionetics argued that since the issue was a purely legal one and did not address the
22 sufficiency of the evidence presented, that it was allowed the skirt the requirements of
23 Federal Rule of Civil Procedure 50(b).

24 The Ninth Circuit rejected this argument and held:

25 A motion for JMOL made after the verdict cannot be entertained unless the
26 moving party requested JMOL prior to the submission of the case to the jury.
27 *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir.1987),
28 amended on other grounds, 857 F.2d 567 (9th Cir.1988), cert. denied, 489
U.S. 1090 (1989); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786
F.2d 1342, 1345–46 (9th Cir.1985). **Even assuming that the issue raised**

1 **by Helionetics was purely legal, this requirement is “strictly observed.”**

2 Id. at 1346. Here, Helionetics moved for judgment as a matter of law for the
3 first time after the verdict was rendered. Therefore, the district court properly
4 denied the Rule 50(b) motion. Helionetics attempts to skirt this requirement
5 by arguing that the issue raised by its motion is “purely legal” and “does not
6 address the sufficiency” of the evidence presented by either side. Helionetics’
7 attempted end-run must fail. Since Helionetics did not raise the issue in any
8 way before submission of the case to the jury, these cases do not afford any
9 relief to Helionetics.

10 100 F.3d 962 (9th Cir. 1996) (emphasis added); *see also Tortu v. Las Vegas Metro. Police*
11 *Dep’t*, 556 F.3d 1075, 1085 n.9 (9th Cir. 2009) (“The determination of qualified immunity
12 at step two is strictly a legal question of whether, even though the facts alleged by the
13 plaintiff make out a constitutional violation, that constitutional right was not clearly
14 established. That issue could have been raised by a motion under Rule 50(a), as was done
15 in *Torres*, 548 F.3d at 1210. However, without the requisite Rule 50(a) motion, this purely
16 legal issue could not be revived under Rule 50(b).”).

17 Since Defendant failed to raise this issue in its JMOL, it cannot now raise this issue
18 in its RJMOL even if it is a “purely legal issue.” Furthermore, even if Defendant had raised
19 this issue in its JMOL, the Court has already addressed this issue in its Order addressing
20 the parties’ cross-motions for summary judgment.

21 There, the Court wrote:

22 A violation of Section 207(r) alone does not necessarily afford a private right
23 of action . . . Plaintiff is not required to be compensated for time used to
24 express milk . . . however, Defendant concedes it compensates nursing
25 mothers during break times. Therefore, any break time used to express milk
26 would have been compensated, and any vacation/sick time used would also
27 have constituted work time spent, and Plaintiff has stated a viable claim
28 alleging she is entitled to compensation for unpaid minimum wages.

(Doc. 131, pg. 9-10).

Ultimately, Defendant properly preserved four issues raised in its RJMOL by raising
them in its JMOL. The Court will next turn to Defendant’s RJMOL.

...

1 **3. Renewed Judgment as a Matter of Law**

2 When evaluating an RJMOL, “the court must draw all reasonable inferences in favor
3 of the nonmoving party, and it may not make credibility determinations or weigh the
4 evidence. Credibility determinations, the weighing of the evidence, and the drawing of
5 legitimate inferences from the facts are jury functions, not those of a judge. Thus, although
6 the court should review the record as a whole, it must disregard all evidence favorable to
7 the moving party that the jury is not required to believe. That is, the court should give
8 credence to the evidence favoring the nonmovant as well as that evidence supporting the
9 moving party that is uncontradicted and unimpeached, at least to the extent that that
10 evidence comes from disinterested witnesses” *Reeves v. Sanderson Plumbing Prod., Inc.*,
11 530 U.S. 133, 150-51, (2000) (internal citations and quotations omitted).

12 An RJMOL “is appropriate when the evidence permits only one reasonable
13 conclusion. The evidence must be viewed in the light most favorable to the nonmoving
14 party, and all reasonable inferences must be drawn in favor of that party.” *LaLonde v. Cty.*
15 *of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000) (internal citations omitted).

16 Defendant raises four specific issues in its RJMOL that it raised in its JMOL at trial
17 and the Court will address the merits of each issue individually.

18 A. *Fair Labor Standards Act*

19 Defendant argues that it is entitled to judgment as a matter of law on the issue of
20 whether it provided Plaintiff with a suitable space to express breast milk in compliance
21 with §207(r) of the FLSA.

22 More specifically, Defendant argues:

23 Aspirational, non-legal requirements aside, the only evidence Clark
24 introduced at trial regarding whether the stations where Clark was assigned
25 had lactation spaces that were “free from intrusion” is Clark’s own testimony
26 that, despite expressing breast milk in multiple stations over more than one
27 year, not one single person ever intruded into any space that she used. Clark’s
28 own experience is dispositive of the question submitted to the jury. Given the
evidence presented, a reasonable juror, unmoved by passion or prejudice and
applying the FLSA’s standards only, could find only in the City’s favor.

1 (Doc. 281, pg. 8) (internal citations omitted); (Doc. 313, pg. 7) (“[Plaintiff] cannot
2 reasonably argue that the lactation spaces were not free from intrusion when no one ever
3 intruded on her.”).

4 Although Defendant’s conclusion may be correct, its reasoning is flawed. That
5 Plaintiff achieved a desired result is not dispositive evidence of compliance.

6 The relevant statute provides, in pertinent part:

7 (r) Reasonable break time for nursing mothers

8 (1) An employer shall provide—

9 (A) a reasonable break time for an employee to express breast milk
10 for her nursing child for 1 year after the child’s birth each time such
11 employee has need to express the milk; and

12 (B) a place, other than a bathroom, that is shielded from view and free
13 from intrusion from coworkers and the public, which may be used by
14 an employee to express breast milk.

15 29 U.S.C. § 207(r).

16 As is evident, section (r)’s requirements are unambiguous. Employers must provide
17 a reasonable break time for nursing mothers to express breast milk and a place, other than
18 a bathroom, that is shielded and free from intrusion with which to do so.

19 Plaintiff rejects Defendant’s position and alleges that “Defendant raised this exact
20 issue in its Motion for Summary Judgment. The issue was fully briefed by the parties. The
21 court expressly rejected Defendant’s argument regarding 29 U.S.C. § 207(r).” (Doc. 304,
22 pg. 6). Plaintiff’s tenuous grasp of the relevant summary judgment standard aside, the
23 Court did not “expressly reject[] Defendant’s argument regarding 29 U.S.C. § 207(r)” when
24 adjudicating the parties’ cross motions for summary judgment. In the Court’s April 24,
25 2018 Order addressing the parties’ summary judgment motions, the Court wrote: “giving
26 both non-moving parties all reasonable inferences, the compliance of each assigned and
27 potentially-assigned station is a genuine issue of material fact. Summary judgment on this
28 issue is not appropriate.” (Doc. 131, pg. 8). The Court’s finding that there was a genuine
issue of material fact is not analogous to a ruling that Plaintiff definitively established that
TFD stations were not compliant.

1 In support of her argument that Defendant violated the FLSA, Plaintiff relies heavily
2 upon an investigation conducted by the Office of Equal Opportunity Programs (“OEOP”).
3 *See* (Doc. 304, pg. 4) (“Defendant completely ignores that its own independent watchdog
4 agency, the Office of Equal Opportunity Programs (OEOP) inspected and evaluated each
5 and every fire station in Tucson and concluded that nine of the 21 stations (or 43%) as of
6 March 2013 did not comply with the FLSA”); *id.* at 5 (“As discussed in OEOP’s findings,
7 Stations 9, 12, 20, and 21 were not in compliance with the FLSA because they did not have
8 a place, other than a bathroom, shielded from view and free from intrusion from coworkers
9 and the public for employees to express breast milk”); (Doc. 84, pg. 3) (“Office of Equal
10 Opportunity Programs (OEOP) Investigator Matthew Larsen concluded that 9 of TFD’s 21
11 fire stations, or 43%, did not have facilities suitable for the expression of breast milk, and
12 thus were non-compliant with § 207(r).”).

13 The OEOP is a branch of the Tucson City Manager’s Office and is responsible for
14 implementing and enforcing equity policies for the City of Tucson. In March 2013, OEOP
15 inspector Matthew Larsen (“Mr. Larsen”) conducted an inspection at twenty-one Tucson
16 Fire Department stations in order to verify compliance with Section 7 of the FLSA. At the
17 time Mr. Larsen conducted his inspection, the break-time mandate for nursing mothers
18 codified in section 207(r) of the FLSA was new and Mr. Larsen testified that he could not
19 rely upon any established legal guidance or interpretation. *See* (Doc. 261, pg. 6) (“It was a
20 relative[ly] new law at this point, so there was not anywhere where we could find it had
21 been tried; and by that I mean tested. There had been no rulings on it, no interpretations
22 offered, so kind of going really what we had to go off of was the letter of what was actually
23 written”).

24 Based upon his interpretation of § 207(r), Mr. Larsen determined that TFD Stations
25 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, and 17 were compliant, but that Stations 3, 9, 10, 12, 18,
26 19, 20, 21, and 22 were not in compliance. *See* (Doc. 304-1, pg. 29-30). Excluding Station
27 9, Mr. Larsen believed that the non-compliant stations could be brought to compliance with
28 the addition of a lock for any unsecured doors. *See e.g., id.* at 32 (“Must install locks on all

1 dorm room doors per the office of equal opportunity’s inspection report.”). Although Mr.
2 Larsen determined that some stations at Tucson Fire were not in compliance due to the lack
3 of a lock, nowhere within section 7(r) of the FLSA is there a requirement that a door must
4 have a lock.

5 At trial, Mr. Larsen acknowledged that, at the time of his investigation, if he had
6 been aware that a lock was not a requirement under the FLSA, he would have determined
7 that every TFD station, excluding Station 9, complied with federal law.

8 Q. Let me rephrase my question, Mr. Larsen. At the time that you did these
9 inspections, if you had knowledge that a lock was not required, would you
10 agree that the fire stations were compliant with the federal law?

11 A. With the exception of one, yes.

12 Q. And which one would that be?

13 A. I believe it was Station 9¹

14 (Doc. 261, pg. 13-14).

15 However, Defendant failed to explore *why* Mr. Larsen believed that all TFD
16 stations, excluding Station 9, were compliant with § 207(r). Both parties appear to rely
17 upon Mr. Larsen’s testimony as dispositive. Plaintiff states in her briefing that Defendant’s
18 “own independent watchdog agency, the Office of Equal Opportunity Programs (OEOP)
19 inspected and evaluated each and every fire station in Tucson and concluded that nine of
20 the 21 stations (or 43%) as of March 2013 did not comply with the FLSA.” (Doc. 304, pg.
21 4). Similarly, Defendant argues that Mr. Larsen “testified that his own assumption that §
22 207(r) required door locks was the only reason that the OEOP listed any station other than
23 Station 9 as noncompliant . . . whether § 207(r) requires door locks is the only question at
24 issue for FLSA liability.” (Doc. 313, pg. 7). Even if the FLSA does not require locks for §
25 207 (r) compliance, TFD stations may have not been compliant.

26 In addition to Mr. Larsen’s testimony on the OEOP’s report, the parties presented
27 testimonial evidence pertaining to the 207(r) compliance of TFD stations.

28 ¹ Plaintiff testified that she never worked at Station 9 so whether Station 9 complied with
the FLSA is immaterial. (Doc. 207, Pg. 39-40) (“Q. After you raised a concern about
Station 9, you were never stationed -- you never actually worked at Station 9; correct? A.
I never actually worked there.”).

1 For example, Plaintiff testified that multiple stations that she was assigned to were
2 not compliant with federal law:

3 Q. Did Medic 12 have a space free from intrusion from coworkers and the
4 public to express your breast milk?

5 A. No, it did not.

6 Q. Where did you pump?

7 A. I pumped in my dorm room, my private dorm room.

8 Q. Did that have a lock or any other way to secure the room to make it free
9 from intrusion?

10 A. No, it did not.

11 (Doc. 208, pg. 61).

12 Q. Now, you testified that Station 12 did not have a private space to lactate,
13 to express your breast milk that was free intrusion from coworkers and the
14 public; right?

15 A. Yes.

16 Q. So why did you ask to stay at Station 12 even knowing it didn't comply?

17 A. So at this point the stations besides the ones I knew for sure, like Station
18 9, Station 8 where we had curtained-type dorm rooms, stations were basically
19 kind of equal to me. Like Medic 20, Medic 12, you've got the same private
20 dorm room. They don't lock. They don't secure.

21 *Id.* at 87

22 Similarly, Battalion Chief Robert Rodriguez testified that "some stations that are
23 newer than others and other stations that have been remodeled; the majority being more
24 current than old. But there were certainly those stations that were unacceptable because
25 they had not been remodeled." (Doc. 284, pg. 15).

26 In contrast, Defendant presented testimony that TFD stations were compliant with
27 federal law. For example, Chief Michael Fischback testified that, based on his
28 interpretation of § 207(r), TFD's stations were in compliance because they contained a
private room that was free from intrusion. See (Doc. 281-1, pg. 6-7) ("[T]hey said that you
had to have a lockable door, and my understanding was all you needed was a private place
where someone could be in a private place without threat of somebody coming in and
disturbing them. And it had worked that way previously for us.").

Ultimately, the evidence presented was conflicting and the jury found that

1 Defendant violated the FLSA by failing to provide Plaintiff with a place free from
2 intrusion. (Doc. 234, pg. 8). When considering a motion for judgment as a matter of law,
3 the Court “must not weigh the evidence, but should simply ask whether the plaintiff has
4 presented sufficient evidence to support the jury’s conclusion.” *Wallace v. City of San*
5 *Diego*, 479 F.3d 616, 624 (9th Cir. 2007). Viewing the evidence in the light most favorable
6 to Plaintiff, the evidence does not permit “only one reasonable conclusion . . . contrary to
7 the jury’s verdict.” *Id.* Defendant’s request for judgment as a matter of law on this issue is
8 denied.

9 *B. Adverse Employment Actions*

10 Next, Defendant alleges that it is entitled to judgment as a matter of law regarding
11 whether Plaintiff suffered any adverse employment actions. In this Circuit, “an adverse
12 employment action is adverse treatment that is reasonably likely to deter employees from
13 engaging in protected activity.” *Ray v. Henderson*, 217 F.3d 1234, 1237 (9th Cir. 2000).
14 An employee engages in protected activity when she takes action to oppose an unlawful
15 employment practice, such as filing a complaint with the Equal Employment Opportunity
16 Commission (“EEOC”). *See Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 525 (9th Cir.
17 1994); *Nilsson v. City of Mesa*, 503 F.3d 947, 954 n. 5 (9th Cir. 2007).

18 Here, the jury determined that Plaintiff was subjected to eleven adverse employment
19 actions ranging from being given an educational counseling and being involuntarily
20 transferred between units, to the deprivation of vacation time, seniority, and compensation.
21 *See* (Doc. 233, pg. 16-17). However, “[n]ot every employment decision amounts to an
22 adverse employment action. For example, mere ostracism in the workplace is not enough
23 to show an adverse employment decision.” *Strother v. S. California Permanente Med.*
24 *Grp.*, 79 F.3d 859, 869 (9th Cir. 1996), as amended on denial of reh’g (Apr. 22, 1996), as
25 amended on denial of reh’g (June 3, 1996).

26 An adverse employment action must rise above a trivial harm and ordinarily, “[a]
27 tangible employment action constitutes a significant change in employment status, such as
28 hiring, firing, failing to promote, reassignment with significantly different responsibilities,

1 or a decision causing a significant change in benefits.” *Burlington Indus., Inc. v. Ellerth*,
2 524 U.S. 742, 761 (1998); *see also Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th
3 Cir. 2000) (“Among those employment decisions that can constitute an adverse
4 employment action are termination, dissemination of a negative employment reference,
5 issuance of an undeserved negative performance review and refusal to consider for
6 promotion.”); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (“Transfers of job
7 duties and undeserved performance ratings, if proven, would constitute adverse
8 employment decisions”) (internal citations and quotations omitted).

9 Plaintiff alleges that she suffered a litany of adverse employment actions. However,
10 many do not rise to the level of an adverse employment action and the Court will address
11 each alleged adverse employment action separately.

12 *i. Educational Counselings*

13 Plaintiff alleges that she was improperly given an educational counseling on three
14 separate occasions for various infractions. The jury determined that all three incidents
15 amounted to an adverse employment action. (Doc. 234). Despite the jury’s finding, it is
16 well established that “written warnings . . . are not adverse employment actions where they
17 do not materially affect the terms and conditions of employment.” *Sanchez v. California*,
18 90 F. Supp. 3d 1036, 1056 (E.D. Cal. 2015); *see also Hoang v. Wells Fargo Bank, N.A.*,
19 724 F. Supp. 2d 1094, 1104 (D. Or. 2010) (“[S]ince the letter did not implement any
20 materially adverse change in the terms and conditions of [plaintiff’s] employment, it was
21 not itself an adverse employment action.”).

22 At trial, Plaintiff testified that these educational counselings did not affect her
23 wages, benefits, or seniority. (Doc. 207, pgs. 73, 82); *see also* (Doc. 208, pg. 130)
24 (Plaintiff’s testimony that an educational counseling is “nonformal discipline.”); (Doc.
25 207, pg. 74) (Plaintiff testifying that the intention of an educational counseling is for
26 administration to educate an employee about a specific issue). Given Plaintiff’s testimony,
27 the three educational counselings were nothing more than written warnings that did not
28 materially affect the terms and conditions of Plaintiff’s employment and, therefore, are not

1 adverse employment actions. *See Weeks v. Union Pac. R.R. Co.*, 137 F. Supp. 3d 1204,
2 1219 (E.D. Cal. 2015) (finding that since a disciplinary notice resulted in “no loss of
3 seniority, no loss of pay, and no discipline” it was not an adverse employment action).

4 *ii. Precluding Plaintiff’s Start-Time, Restricting Plaintiff’s Ability to*
5 *Exercise, and Requiring a Doctor’s Note*

6 Plaintiff alleges that she suffered three adverse employment actions when
7 Defendant restricted her start-time, ability to exercise, and required her to furnish a doctor’s
8 note to utilize sick leave. Generally, “[e]mployment actions which do not result in changes
9 in pay, benefits, seniority, or responsibility . . . are insufficient to sustain a retaliation
10 claim.” *Jernigan v. Alderwoods Grp., Inc.*, 489 F. Supp. 2d 1180, 1200 (D. Or. 2007).
11 While prohibiting Plaintiff from starting her day at a certain time and restricting her ability
12 to exercise may be obstacles, those obstacles were minor and “[n]ot every employment
13 decision amounts to an adverse employment action.” *Strother v. S. California Permanente*
14 *Med. Grp.*, 79 F.3d 859, 869 (9th Cir. 1996), as amended on denial of reh’g (Apr. 22, 1996),
15 as amended on denial of reh’g (June 3, 1996). Plaintiff presented no evidence that any of
16 these employment actions materially affected Plaintiff’s job and they cannot be properly
17 categorized as adverse employment actions.

18 *iii. Deprivation of Vacation Time and Wages*

19 Plaintiff alleges that the following three incidents involving a deprivation of her
20 vacation time and wages constitute adverse employment actions: the lack of compensation
21 for being deposed on four separate occasions, the deprivation of specialty pay in the amount
22 of \$69.23, and the deprivation of 3 hours of vacation time. The Ninth Circuit has previously
23 recognized that “an adverse employment action exists where an employer’s action
24 negatively affects its employee’s compensation.” *Fonseca v. Sysco Food Servs. of Arizona,*
25 *Inc.*, 374 F.3d 840, 847 (9th Cir. 2004). While a deprivation or reduction in a plaintiff’s
26 salary is often held to be an adverse employment action, the amount in question, while not
27 dispositive, is not irrelevant. The Court finds guidance in the Supreme Court’s definition
28 of an adverse employment action as an action that “constitutes a **significant** change in

1 employment status, such as hiring, firing, failing to promote, reassignment with
2 significantly different responsibilities, or a decision causing a **significant** change in
3 benefits.” *Burlington*, 524 U.S. at 761 (emphasis added).

4 Therefore, while a *significant* change in an employee’s benefits is an adverse
5 employment action, an insignificant change is not. *Compare Howard v. Washington*, 254
6 F. App’x 576, 578 (9th Cir. 2007) (finding that plaintiff whose salary was cut by \$9,000.00
7 was subjected to an adverse employment action), and *Little v. Windermere Relocation, Inc.*,
8 301 F.3d 958, 970 (9th Cir. 2002) (employer’s reduction of employee’s guaranteed
9 monthly base salary by \$1,000 constituted an adverse employment action), *with Molina v.*
10 *Los Angeles Cty., Dep’t of Mental Health*, 58 F. App’x 311, 315 (9th Cir. 2003)
11 (unpublished) (finding that the loss of one-hour’s pay did not rise to the level of an adverse
12 employment action).

13 Here, Plaintiff was deprived of specialty pay amounting to \$69.23 and improperly
14 deprived of 3 hours of vacation time. Given the relative insignificance of the amounts
15 complained about, these incidents do not amount to adverse employment actions. However,
16 Plaintiff’s lack of compensation for being deposed on four separate occasions is a different
17 matter. Plaintiff testified that she was either “charged” vacation time or completely
18 deprived of her pay when she attended four separate depositions. (Doc. 208, pg. 195).
19 Plaintiff also testified that the value of eight hours of vacation time amounted to “a couple
20 hundred dollars.” *Id.* If Plaintiff was only deprived of compensation on one occasion, this
21 would likely be an insignificant change in her benefits. However, Plaintiff was deprived of
22 compensation and charged vacation time on four separate occasions, which amounted to
23 hundreds of dollars, if not more. This amounts to a significant change in Plaintiff’s benefits
24 and viewing the evidence presented most favorably to Plaintiff, the Court finds that the
25 jury properly determined that this was an adverse employment action.

26 *iv. Involuntary Transfer*

27 In April 2016, Plaintiff was involuntarily transferred from her position as an
28 inspector in the fire prevention department to field operations as a paramedic. (Doc. 208,

1 pg. 187-88). When asked about the difference between the two departments, Plaintiff
2 testified that her position at fire prevention had a very predictable eight-hour shift,
3 Monday-through-Friday, and that her new position at operations had a twenty-four-hour
4 shift. (Doc. 208, pg 187-88). In addition to the difference between shifts, the two positions
5 had significantly different job duties. In fire prevention, Plaintiff was tasked with
6 inspecting new building constructions for compliance with fire codes. (Doc. 208, pg. 180-
7 81). As a paramedic, Plaintiff was tasked with performing emergency medical services and
8 “fire suppression, fire prevention and emergency response activities.” (Doc. 118-2, pg. 39).

9 While it has been previously held that a lateral transfer can constitute an adverse
10 employment action, that characterization is generally reserved for those transfers that
11 tangibly affect an employee’s benefits, wages, or career prospects. *See Ray*, 217 F.3d at
12 1241 (“While mere ostracism by co-workers does not constitute an adverse employment
13 action, a lateral transfer does.”) (internal citations and quotations omitted); *Firestine v.*
14 *Parkview Health Sys., Inc.*, 388 F.3d 229, 235 (7th Cir. 2004) (“Transfers that
15 quantitatively affect benefits or wages or that significantly reduce an employee’s career
16 prospects may constitute adverse action”); *Steiner v. Showboat Operating Co.*, 25 F.3d
17 1459, 1465 n.6 (9th Cir. 1994) (Finding that a shift transfer was “just barely”
18 characterizable as an adverse employment action because it did not involve a demotion or
19 a change in job duties); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir.
20 1996) (declining to characterize an involuntary transfer to a different department, with no
21 change in compensation, as an adverse employment action).

22 If the only change that occurred from this involuntary transfer was a switch from an
23 eight-hour shift to a twenty-four-hour swing shift, this transfer could not properly be
24 characterized as an adverse employment action. However, this transfer involved more than
25 just a mere change in an hourly shift, but a significant change in Plaintiff’s job duties and
26 “a material change in the terms and conditions of a person’s employment” is an adverse
27 employment action. *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115,
28 1126 (9th Cir. 2000); *see also Yartzoff*, 809 F.2d at 1376 (“Transfers of job duties and

1 undeserved performance ratings, if proven, would constitute” an adverse employment
2 action). Since Plaintiff’s involuntary transfer from fire prevention to operations
3 necessitated a substantial change in her job duties, and viewing the evidence presented
4 most favorably to Plaintiff, the Court finds that the jury properly determined that this was
5 an adverse employment action.

6 *v. Deprivation of Seniority*

7 On May 13, 2016, Defendant announced that it would recalculate how it determined
8 seniority, causing Plaintiff to lose approximately two years of seniority. (Doc. 208, pg.
9 192). Seniority at TFD is important as it dictates an employee’s station assignment. (Doc.
10 208, pg. 188-89). An employment decision that erases two years of seniority and
11 effectively eliminates Plaintiff’s ability to choose her own station is an action that
12 significantly changes the “terms and conditions” of employment and can be characterized
13 as an adverse employment action. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788
14 (1998). By May 2016, Plaintiff had filed her lawsuit against Defendant and Defendant was
15 clearly aware that the new seniority policy would impact Plaintiff negatively. (Doc. 296,
16 pg. 41-42). Viewing the evidence presented most favorably to Plaintiff, the Court finds that
17 the jury properly determined that this was an adverse employment action.

18 *C. Retaliatory Intent*

19 In order to prove that retaliation was a motivating factor behind an adverse
20 employment action, the Plaintiff must prove: (1) she had engaged in a protected activity;
21 (2) her employer subjected her to an adverse employment action; and (3) a causal link
22 existed between the protected activity and the adverse employment action. *Nilsson*, 503
23 F.3d at 954.

24 Despite the jury’s finding, even viewing all of Plaintiff’s eleven enumerated
25 allegedly adverse employment actions in the light most favorable to Plaintiff, only three
26 can be properly considered an adverse employment action and the Court will determine
27 whether the three actions were motivated by retaliatory intent.

28 ...

1 denied.

2 *ii. Lateral Transfer*

3 Here, Plaintiff was subject to an involuntary lateral transfer that entailed a
4 significant change in her job duties. At trial, Chief Critchley testified that he transferred
5 Plaintiff to take advantage of her paramedic and nursing background. (Doc. 294, pg. 132).
6 Despite Chief Critchley's explanation, the effect of this lateral transfer was to deprive
7 Plaintiff of a stable Monday through Friday shift and cause Plaintiff a great deal of
8 uncertainty. (Doc. 207, pg. 83). Construing the evidence in a light most favorable to
9 Plaintiff, the evidence does not permit only one conclusion and the jury had sufficient
10 evidence to conclude that Plaintiff was retaliatorily transferred. Defendant's request for
11 judgment as a matter of law on this issue will be denied.

12 *iii. Loss of Seniority*

13 The next question is whether Plaintiff's loss of seniority was based upon a
14 retaliatory motive. Trial testimony established that the seniority policy was the product of
15 negotiations between the union and TFD administration. (Doc. 207, pg. 84-85). However,
16 given the effect on Plaintiff's seniority, it is unclear as to why it was implemented and why
17 Plaintiff was the only employee to lose her seniority.

18 When an adverse employment action is based on protected and unprotected
19 activities, the Court must apply the "dual motive" test described in *Mt. Healthy City Sch.*
20 *Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). "Under the dual motive test, a plaintiff
21 must show that her protected activities were a substantial factor in the complained of
22 adverse employment action. Protected activities are a substantial factor where the adverse
23 actions would not have been taken but for the protected activities. In dual motive cases, it
24 is the defendant's affirmative burden to prove that it would have taken the adverse action
25 if the proper reason alone had existed." *Knickerbocker v. City of Stockton*, 81 F.3d 907,
26 911 (9th Cir. 1996) (internal citations and quotations omitted).

27 It is not evident that Defendant established that it would have implemented the
28 seniority policy at a different date so not to affect Plaintiff's seniority. Although there was

1 evidence at trial establishing that the policy was negotiated between the Union and TFD
2 administration, (Doc. 207, pg. 84-85), the timing of the policy, especially pertaining to
3 Plaintiff, appears suspect. Plaintiff was notified of the new seniority policy on May 13,
4 2016 and the policy was backdated to be effective on May 1, 2016. After her involuntary
5 transfer, Plaintiff began her position as a swing-shift paramedic on May 2, 2016. (Doc.
6 208, pg. 191). Given that Defendant was aware that the application of the seniority policy
7 would negatively affect Plaintiff and given that Plaintiff “was the only loser as a result of
8 the retroactive application” of the new seniority policy, it is not entirely clear whether the
9 policy would have been implemented when it was implemented if not for Plaintiff’s
10 engagement in a protected activity. (Doc. 296, pg. 54).

11 Construing the evidence in a light most favorable to Plaintiff, it is unclear whether
12 the policy was implemented for non-nefarious reasons. “A judgment as a matter of law is
13 appropriate when the evidence permits only one conclusion.” *Price v. Kramer*, 200 F.3d
14 1237, 1244 (9th Cir. 2000). In this case the jury had sufficient evidence to conclude that
15 Defendant implemented the seniority policy in order to retaliate against Plaintiff for her
16 engagement in a protected activity and Defendant’s request for judgment as a matter of law
17 on this issue will be denied.

18 *D. Sex Discrimination – Title VII*

19 Defendant next argues that Plaintiff was not the victim of sex discrimination. At
20 trial, Plaintiff alleged that she was the victim of sex discrimination and presented, at trial,
21 three male TFD employees who were allegedly treated more favorably than her. Those
22 three male employees were under investigation for various criminal infractions including
23 driving under the influence. The Court previously determined that these employees would
24 be permitted to testify when addressing the parties’ motions in limine, as their testimony
25 would be relevant. (Doc. 176). At trial, the Court once again reconsidered the issue but
26 determined that since the testimony was relevant, any objection went to the weight of the
27 evidence and not its admissibility. (Doc. 207, pg. 44).

28 In order to bring a proper Title VII claim for sex discrimination, Plaintiff must,

1 among other things, establish that “similarly situated individuals outside [her] protected
2 class were treated more favorably.” *Chuang*, 225 F.3d at 1123. However, not only must
3 Plaintiff establish this, Plaintiff must also establish that these individuals are similarly
4 situated “in all material respects.” *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006).
5 “[W]hether two employees are similarly situated is ordinarily a question of fact.” *Beck v.*
6 *United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 885 n.5 (9th Cir.
7 2007). Generally, the Ninth Circuit determines that “individuals are similarly situated when
8 they have similar jobs and display similar conduct.” *Vasquez v. Cty. of Los Angeles*, 349
9 F.3d 634, 641 (9th Cir. 2003), as amended (Jan. 2, 2004).

10 The evidence presented at trial relating to these three male employees permits only
11 one reasonable conclusion: that they were not similarly situated to Plaintiff in all material
12 respects. The three comparator employees were male firefighters with pending criminal
13 charges. Those employees were involuntarily provided various station assignments as part
14 of TFD’s disciplinary action. *See* (Doc. 282, pg. 4-5). None of the three male employees
15 requested a specific assignment and all were transferred involuntarily. In contrast, Plaintiff
16 requested a specific assignment that would accommodate her breast pumping needs. The
17 evidence presented at trial is clear: three male employees were involuntarily transferred as
18 a disciplinary measure and were not provided a specific station assignment based upon
19 their own personal preference.

20 According to guidance note issued by the EEOC, employees who are similarly
21 situated to a lactating mother would be those with “similarly limiting medical conditions.”
22 EEOC Guidance No. 915.003, 2015 WL 4162723, at *8. If the three male employees that
23 Plaintiff presented as comparator employees had, for example, broken legs, and
24 specifically requested a station assignment that would better accommodate their non-
25 ambulatory status and TFD provided them with that accommodation while denying
26 Plaintiff’s request, Plaintiff could properly assert that those employees were similarly
27 situated in all material respects. However, the evidence presented at trial clearly shows that
28 the three male employees were not similarly situated to Plaintiff in all material respects

1 and judgment as a matter of law will be granted on Plaintiff’s Title VII claims for disparate
2 treatment and retaliation.

3 **4. Motion for a New Trial**

4 Defendant raises numerous issues in support of its request for a new trial. The Court
5 finds Defendant’s first issue regarding a grossly excessive jury verdict to be sufficient and
6 will not address, in detail, the merits of the remaining issues.

7 **A. Grossly Excessive Verdict**

8 After a two-week jury trial, Plaintiff was awarded \$3,800,000.00. “A verdict based
9 on the bias, passion, or sympathy of the jury cannot be permitted to stand.” *Skydive*
10 *Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1115 (9th Cir. 2012). “Beyond obvious bias
11 or passion, a verdict will also not be sustained on appeal if it is ‘grossly excessive’ or
12 ‘monstrous.’” *Id.* (quoting *Baldwin v. Warwick*, 213 F.2d 485, 486 (9th Cir. 1954)).

13 Plaintiff argues that courts routinely uphold “similar awards in employment
14 discrimination or similar cases.” (Doc. 304, pg. 18). In support, Plaintiff cites *Harper v.*
15 *City of Los Angeles* 533 F.3d 1010, 1029 (9th Cir. 2008). *Harper* is clearly distinguishable.
16 In *Harper*, three former Los Angeles Police Department officers who were wrongfully
17 implicated in an ongoing corruption scandal were investigated and convicted. Those
18 officers were later acquitted, but suffered severe physical, mental, and career
19 consequences.

20 As outlined in *Harper*:

21 Each officer testified about the adverse physical and emotional effects of the
22 media attention and his loss of reputation. Harper developed high blood
23 pressure and intestinal problems; he began to drink frequently and heavily
24 and became paranoid. Ortiz became suicidal and experienced heartburn, back
25 and neck pain, and anxiety attacks. Liddy gained 100 pounds, was
26 hospitalized for chest pains, and developed high blood pressure and anxiety.

26 The Officers also testified as to the adverse effect the experience had on their
27 personal and professional lives. Harper had to work lower-paying security
28 jobs; his house was searched in front of his girlfriend and her young daughter;
he was told he was put on a hit-list by a gang member shot and framed by
Perez; and even after he was cleared of all charges and returned to the LAPD

1 he was unable to work on the street because of the publicity and had to take
2 a desk job. Ortiz was also told he was on a hit-list; his family broke apart
3 when his wife left him because of the negative publicity, and his teenage
4 stepdaughter ran away, attempted suicide and was placed in a psychiatric
5 ward. Liddy lost his career, filed for bankruptcy, and the negative publicity
6 had significant adverse effects on his young children. This testimony is
7 substantial evidence from which the jury could find that the harm to each
8 officer justified an identical damage award.

9 *Harper v. City of Los Angeles*, 533 F.3d 1010, 1029 (9th Cir. 2008).

10 After suing the City of Los Angeles, the officers were each awarded \$5,000,000.00
11 in compensatory damages. The corruption investigation caused a far greater negative
12 impact on the lives of Officers Harper, Ortiz, and Liddy than Defendant's treatment of
13 Plaintiff. While Plaintiff testified that she was "emotionally worn down," (Doc. 208, pg.
14 173), the officers in *Harper* developed severe physical symptoms, suicidal ideations, had
15 their lives jeopardized, and lost their careers.

16 In contrast, Plaintiff testified that she attended counseling sessions, but the records
17 of those sessions were never disclosed and no expert testified regarding her mental health
18 or related damages. (Doc. 208, pg. 213). Similarly, Plaintiff testified that the incidents at
19 TFD created relationship issues with her husband, nearly culminating in divorce. (Doc.
20 293, pg. 105-06). However, Plaintiff also testified that the problems with her marriage, and
21 other emotional stressors, were exacerbated by comments by anonymous internet users and
22 not due solely to actions by TFD. (Doc. 208, pg. 174-75).

23 Setting aside the horrific consequences that the investigation had on their personal
24 lives, Officers Harper, Ortiz, and Liddy objectively suffered far greater career
25 consequences than Plaintiff. With respect to her employment, Plaintiff presented evidence
26 that a small amount of money was wrongfully withheld, a small amount of vacation time
27 was deducted, and that she was deprived of some seniority. A multi-million-dollar verdict
28 for compensatory damages appears appropriate and commensurate with the severe
financial consequences suffered by Officers Harper, Ortiz, and Liddy. Plaintiff's hardships,
while not insignificant, clearly do not rise to the level of that in *Harper*.

1 Plaintiff cites another case to support her jury award, *Migis v. Pearle Vision, Inc.*,
2 135 F.3d 1041 (5th Cir. 1998). Not only is *Migis* distinguishable, it undermines Plaintiff's
3 argument. There, plaintiff Melissa Migis alleged that she was wrongfully terminated from
4 her job due to her pregnancy. At trial, Migis testified regarding the emotional suffering she
5 endured due to the termination.

6 The evidence of mental anguish testimony in the pending case consisted
7 solely of Migis's testimony. She testified that her termination, which came
8 without warning, was "a major inconvenience," and that she suffered low
9 self-esteem "not only from not having worked but from getting terminated
10 and not offered a position that I thought I was qualified for...." With her new
11 baby she suffered financial hardships. She stated that she suffered "almost
12 what I would call stress attacks or anxiety attacks," marital hardship, and
13 "major stress," as well as "lot[s] of crying, sleeplessness."

14 *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (5th Cir. 1998).

15 Migis was later awarded compensatory damages based upon her testimony and that
16 award was later contested. On appeal, the Fifth Circuit upheld the award and reasoned that
17 "Migis's testimony of anxiety, sleeplessness, stress, marital hardship and loss of self-
18 esteem was sufficiently detailed to preclude [it] from holding that the district court abused
19 its discretion in its award of compensatory damages." *Id.* Like Plaintiff, Migis suffered
20 from stress, anxiety, and marital hardship. Unlike Plaintiff, Migis was terminated from her
21 position, an undeniably more severe career consequence than any of Plaintiff's alleged
22 adverse employment actions. Given that Migis and Plaintiff experienced similar hardships
23 in their personal lives, and that Migis experienced an objectively more severe career
24 consequence, the amounts awarded to the two parties would reasonably be expected to be
25 comparable. However, Migis was awarded a *total* of \$5,000.00 in compensatory damages
26 by the court for her mental anguish. In comparison, the jury in this case awarded Plaintiff
27 a staggering *760 times* that amount, or \$3,800,000.00.

28 There is an abundance of additional examples demonstrating the gross excess of the
jury's verdict in this case. For example, in *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th
Cir. 1999), multiple employees were terminated in retaliation for lodging complaints

1 relating to overtime pay. Those employees testified regarding the emotional impact the
2 illegal terminations had taken upon their lives. They were eventually awarded \$75,000 each
3 for emotional distress damages, which the Ninth Circuit found to be neither “grossly
4 excessive or monstrous.” *See also Higgins v. Assmann Elecs., Inc.*, 217 Ariz. 289, 295
5 (Ariz. Ct. App. 2007) (Plaintiff was fired and suffered emotional distress including post-
6 traumatic stress disorder, which required therapy and was awarded \$300,000.00, which
7 was deemed to be an amount that did not shock the conscience of the court).

8 In another case, *Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988), a jury’s
9 \$300,000.00 award for emotional distress and psychological damage was upheld because
10 Plaintiff provided evidence that he suffered from “severe and malignant insomnia, anxiety,
11 suicidal fantasies, quiet and severe depression and anxiety.” *Id.* In addition, Plaintiff
12 provided an expert witness who corroborated Plaintiff’s damages and testified that plaintiff
13 “suffered from permanent psychological damage and would require treatment for several
14 years.” *Id.*

15 Plaintiff clearly suffered emotionally, as she effectively described to the jury.
16 However, the jury verdict was staggering in comparison to other similar cases and is more
17 consistent with a punitive damages award. It is true that a court should “not lightly cast
18 aside the solemnity of the jury’s verdict.” *Graves v. City of Coeur D’Alene*, 339 F.3d 828,
19 844 (9th Cir. 2003). However, the established case law shows that for more serious cases,
20 compensatory damages related to emotional distress never reach the amounts awarded by
21 the jury in this case, especially given the emotional distress testimony provided by Plaintiff.
22 Therefore, the Court can only conclude that the jury’s verdict was not to compensate, but
23 to punish the Defendant.

24 In hindsight, even Plaintiff’s counsel indirectly acknowledged the grossly excessive
25 nature of the jury’s verdict. During closing argument, he stated:

26 What’s emotional distress damages worth? 50 bucks an hour? 25 bucks an
27 hour? If you multiply 25 bucks an hour times 24 hours a day times 365 days
28 a year times six and a half years that Carrie’s been dealing with this, you
have a pretty high number. It’s like 1.4 million. **Now we’re not asking you**

1 **for that because we're asking you to be intellectually honest when you**
2 **go back there and deliberate.** We're asking you to be intellectually honest
3 with yourselves and with each other, and we can't be intellectually honest
4 with you and look at you and say that 365 days a year, 24 hours a day,
5 Carrie's experiencing that. It waxed and waned. There were good days and
6 bad days.

(Doc. 235, pg. 45) (emphasis added).

7 Plaintiff's attorney directly acknowledged that a \$1,400,000.00 award would be
8 unreasonable because "[t]here were good days and bad days." *Id.* However, generally, an
9 excessive damages awards is insufficient to necessitate a new trial unless there is also
10 evidence that passion and prejudice influenced the jury's verdict.

11 Here, not only was there a grossly excessive jury verdict, it is clear that the passion
12 of the jury was inflamed, and a new trial is necessary. *Pershing Park Villas Homeowners*
13 *Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 905 (9th Cir. 2000), as amended (Aug. 11,
14 2000). When discussing the impact the case was having on her personal life, Plaintiff
15 testified that she was undergoing a multitude of difficulties in her personal life, as discussed
16 in counsel's briefing. *See* (Doc. 208). While these experiences were traumatic and
17 undoubtedly contributed to Plaintiff's distress, the evidence does not establish that
18 Defendant directly caused them.

19 Furthermore, during Plaintiff's closing argument, Plaintiff's counsel argued the
20 following:

21 What will you do to serve -- what you will do will serve to warn others . . .
22 What you do will serve to warn others to obey the law and the consequences
23 if they don't. Other city departments besides the fire department are
24 watching. Mayor and council are watching. Other governments, like Marana,
25 Oro Valley, Sahuarita, they're watching. It's up to you to decide how much
26 to award in this case and what amount of money would accomplish those
27 obligations.

(Doc. 235, pg. 46-47).

28 It is clear that Plaintiff advocated for punitive damages and that the jury's award
reflected this sentiment. Plaintiff's closing argument was not a call for compensatory

1 damages for the allegedly retaliatory actions Plaintiff endured but was a call advocating
2 for punishment of TFD. Plaintiff counsel’s rhetoric advocating for punishment and a
3 warning to other government agencies was a request for punitive damages, which are not
4 available in this case. Punitive damages “are not compensation for injury. Instead, they are
5 private fines levied by civil juries to punish reprehensible conduct and to deter its future
6 occurrence.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

7 The final jury instructions and verdict forms did not discuss punitive damages. (Doc.
8 233). Given Plaintiff’s rhetoric at closing and the actual verdict amount, the jury’s award
9 was most certainly for punitive and not compensatory damages. Otherwise, the verdict
10 would more closely mirror the verdicts in cases discussed *herein* with more extreme facts.
11 Ordinarily, “a verdict which can be characterized as grossly excessive or monstrous will
12 not be sustained on appeal.” *Plumbers & Steamfitters Union, Local No. 598 v. Dillion*, 255
13 F.2d 820, 824 (9th Cir. 1958). This verdict is grossly excessive. However, despite the
14 meritorious nature of Defendant’s Motion for a New Trial as to damages, before a new trial
15 is ordered, the Court will determine whether the case is appropriate for a remittitur.

16 **5. Remittitur**

17 When the court, after viewing the evidence concerning damages in a light most
18 favorable to the prevailing party, determines that the damages award is excessive, it has
19 two alternatives. It may grant defendant’s motion for a new trial or deny the motion
20 conditional upon the prevailing party accepting a remittitur. *Fenner v. Dependable*
21 *Trucking Co.*, 716 F.2d 598, 603 (9th Cir. 1983). Remittitur is a device used to correct an
22 excessive verdict and must reflect “the maximum amount sustainable by the proof.” *D &*
23 *S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982).
24 This jury verdict is based upon Plaintiff’s emotional distress damages and “[j]udgments
25 regarding noneconomic damages are notoriously variable.” *Forsyth v. City of Dallas, Tex.*,
26 91 F.3d 769, 774 (5th Cir. 1996). Generally, “courts are required to maintain some degree
27 of uniformity in cases involving similar losses.” *Shaw v. United States*, 741 F.2d 1202,
28 1209 (9th Cir. 1984). Applying that concept to jury verdicts, the Court will compare the

1 verdict amount to awards in similar cases in this District.

2 Examining relevant employment discrimination jury verdicts in the District of
3 Arizona reveals that very few ever cross the \$1,000,000.00 threshold. For example, in the
4 following employment discrimination cases, a plaintiff, or a group of plaintiffs, were
5 awarded at least \$1,000,000.00 in damages:

- 6 • \$1,000,000.00 was awarded in *Adams v. Arizona Senate*, 2019 WL 4200710.
7 This case involved allegations of race and sex discrimination, retaliation, and
8 equal pay. Unlike the Plaintiff, Talonya Adams, was denied salary increases
9 commensurate with her experience and was later terminated from her
10 position.
- 11 • \$2,425,000.00 was awarded in *Amaya v. City of Tempe*, 2005 WL 3954723.
12 This case involved a class of twelve City of Tempe employees suing the City
13 of Tempe Public Works Department claiming that they were subjected to a
14 hostile work environment. The employees were allegedly subjected to severe
15 racial discrimination and were regularly referred to as “‘stupid Mexicans,’ ‘a
16 bunch of tacos’ and ‘spics,’ among other derogatory names.” After reporting
17 the harassment, the employees were subjected to discipline, without cause,
18 and were segregated and “‘given worse working conditions than non-Hispanic
19 employees.” The twelve employees were awarded amounts of \$175,000.00
20 to \$475,000.00 each.
- 21 • \$2,900,750.00 was awarded in *Sorkilmo v. Qwest Corp.*, 2005 WL 3954736.
22 Here, Kimberly Sorkilmo suffered sexual harassment and suffered severe
23 emotional distress and was later terminated after lodging a complaint. Ms.
24 Sorkilmo was awarded \$600,00.00 in compensatory damages, \$200,750.00
25 in back pay, and \$2,100,000.00 in punitive damages. This award was later
26 reduced to \$500,750.00 pursuant to the Title VII damages cap.
- 27 • \$8,000,000.00 was awarded in *EEOC v. Alliedsignal*, 1999 WL 1823235.
28 This case involved a class of nearly 350 employees alleging they were
terminated from their employment based on their age.

23 As is evident, an award of this magnitude and involving these facts is
24 unprecedented. Two of the four multimillion-dollar verdicts involved a large class of
25 employees, one of which numbered in the hundreds. The other two single plaintiff cases
26 both involved plaintiffs who were terminated from their positions and had significant
27 claims of lost wages. Here, Plaintiff was awarded an amount in excess of what was awarded
28 to a class of twelve and was awarded an amount approximately half of what was awarded

1 to a class of hundreds. Considering the facts of this case, the jury's verdict was clearly
2 excessive. Plaintiff's damages involved no significant lost wages and were predicated
3 almost exclusively upon her emotional distress damages.

4 Furthermore, Plaintiff advanced two theories of retaliation at trial, one based on the
5 FLSA and the other on Title VII. Even though two discrete theories were advanced, the
6 underlying conduct for both theories is identical. On the section of the verdict form entitled:
7 "Title VII Retaliation," eleven allegedly adverse employment actions are listed. In a later
8 section of the verdict form entitled: "Fair Labor Standards Act Retaliation," those exact
9 eleven allegedly adverse employment actions are identically listed. Plaintiff advanced two
10 separate theories of liability for identical conduct. Although the jury found that Plaintiff
11 was subjected to multiple adverse employment actions, it improperly awarded a duplicative
12 award based upon that identical conduct.

13 A duplicative damages award is found if a plaintiff advances multiple theories of
14 liability comprised of identical conduct. *See Diversified Graphics, Ltd. v. Groves*, 868 F.2d
15 293, 295 (8th Cir. 1989) ("In instances where a party's claims are simply alternative
16 theories seeking relief for the same injury, that party is not entitled to a separate
17 compensatory damage award under each legal theory. On the contrary, he is entitled only
18 to one compensatory damage award if liability is found on any or all of the theories
19 involved.") (internal citations and quotations omitted). The Supreme Court has also held
20 that "the courts can and should preclude double recovery by an individual." *Gen. Tel. Co.*
21 *of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 333 (1980). "Where
22 a plaintiff seeks recovery for the same damages under different legal theories, only a single
23 recovery is allowed." *Conway v. Icahn & Co.*, 16 F.3d 504, 511 (2d Cir. 1994).

24 Given the identical amounts awarded to Plaintiff for her distinct legal causes for
25 retaliation, it is apparent that the jury's award was duplicative. Plaintiff should not be
26 permitted to collect twice for identical conduct. In addition, the parties acknowledge that
27 Title VII provides a statutory cap for damages in the amount of \$300,000.00. *See* (Doc.
28 304, pg. 32); (Doc. 281, pg. 27). Therefore, the jury's total verdict should properly be in

1 the amount of \$2,200,000.00. However, even considering this reduction, the verdict was
2 clearly excessive, and against the clear weight of the evidence. The Court concludes that a
3 remittitur is appropriate and grants remittitur in the amounts described below and adjusting
4 for the Court's finding that Defendant is entitled to judgment as a matter of law on some
5 of Plaintiff's claims:

- 6 • Title VII Disparate Treatment: \$0.00
- 7 • Title VII Retaliation: \$0.00
- 8 • Fair Labor Standards Act: \$ 50,000.00
- 9 • Fair Labor Standards Act Retaliation: \$ 200,000.00

10 Accordingly, IT IS ORDERED:

11 1. Defendant's Motion for Judgment as a Matter of Law (Doc. 281) is **granted in**
12 **part and denied in part.**

13 a. Defendant's request for judgment as a matter of law relating to Plaintiff's
14 Fair Labor Standards Act claims is **granted in part and denied in part.**

15 i. Defendant's request for judgment as a matter of law on whether it
16 satisfied the FLSA's requirements is **denied.**

17 ii. Defendant's request for judgment as a matter of law on whether
18 Plaintiff was subjected to adverse employment actions and
19 retaliation is **granted** as to Plaintiff's claims relating to:
20 educational counselings, start-time, ability to exercise, requiring a
21 doctor's note, deprivation of specialty pay, and deprivation of
22 vacation time, but **denied** as to Plaintiff's claims relating to:
23 deprivation of deposition pay, involuntary transfer, and loss of
24 seniority.

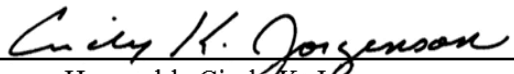
25 b. Defendant's request for judgment as a matter of law relating to Plaintiff's
26 Title VII claims is **granted** as to the underlying disparate treatment claim
27 and the related retaliation claims.

28 2. Defendant's Motion for Remittitur is **granted** in the amounts provided above.

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Plaintiff has thirty (30) days with which to accept or decline the Remittitur.
3. If Plaintiff declines to accept the remittitur, Defendant's Motion for a New Trial
will be **granted** as to damages on her FLSA claims.

Dated this 24th day of February, 2020.



Honorable Cindy K. Jorgenson
United States District Judge